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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*

v.

ELLER TELECASTING CO. OF ARIZONA, *Respondent.*

On Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District, Division One

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the California Court of Appeal, that a California statute unduly burdened interstate commerce when it was applied to enjoin an Arizona television station from broadcasting certain price advertising addressed to Arizona viewers by an Arizona optical firm doing business solely in Arizona and seen only incidentally by distant California viewers, is in accord with the decision of this Court in *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424.

STATEMENT

The Court of Appeal stated in its opinion (Petition, Appendix A, pp. 3-5) the following stipulated facts:

"(1) Eller, a telecasting company, is an Arizona corporation, producing television programs and advertising which it transmits over Station KBLU, Channel 13, for which it holds a Federal Communications Commission license.

"(2) Since 1966 Eller has maintained a television transmitting tower on Black Mountain which is located in Imperial County, California.

"(3) All of Eller's programming emanates from Arizona. Live programs originate in its studio in Yuma, Arizona, are transmitted to the Black Mountain tower and there re-transmitted to viewers in Arizona, Mexico and Imperial County. Network programs are relayed from Phoenix to Eller's studio in Yuma, transmitted to Black Mountain and re-transmitted to viewers in Arizona, Mexico and Imperial County.

"(4) Eller maintains no television studios in California, but it does have a sales office, employing one salesman, located in El Centro, California. It derives 7% of its income from local Imperial County advertisers; 93% of its income comes from Arizona, regional and network programming.

"(5) Mesa Optical Company is a business organization engaged in the business of filling optometric prescriptions for optometrists and ophthalmologists. It does business only in the State of Arizona and does not engage in mail-order business in anyway. It has one office in Flagstaff, one in Yuma, one in Mesa, two in Tucson and four offices in Phoenix.

"(6) The advertising program of Mesa Optical Company, as produced by Station KBLU in Yuma, Arizona, is in full compliance with the laws of the

State of Arizona. Some of the advertising of Mesa Optical Company advertises optometrical services and eye protective devices at a fixed price.

"(7) Mesa Optical Company does not do business in the State of California, and to revise its advertising program to conform to the objections of the State of California in the Yuma, Arizona area alone would cause great expense and additional costs to the company. Its advertising program is designed, intended and directed to the population of the entire State of Arizona, and to require it to alter its advertising program for the Yuma area only would cause the company great financial hardship."

ARGUMENT

THE DECISION BELOW IS IN ACCORD WITH THIS COURT'S DECISION IN THE HEAD CASE AND RAISES NO SPECIAL AND IMPORTANT CONSTITUTIONAL QUESTION FOR REVIEW BY THE COURT.

The sole reason advanced by petitioner for the granting of a writ of certiorari is that in its view the decision of the California Court of Appeal is in conflict with this Court's decision in *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963).

We contest this assertion. The California court did *not* disagree with this Court's holding in *Head* that a state has the power to regulate this kind of advertising broadcast by a television station located within the regulating state. The California court did *not* hold the statute in question, the California Business and Professional Code, Sections 3129-3131, to be unconstitutional. Nor did it disagree with the legitimate purpose of the statute to protect the public health. The court did refuse to impose the sanctions of the statute governing the practice of optometry in the State of California upon an Arizona television station carrying

an Arizona optical company's commercial messages originating in Arizona and directed solely to viewers in Arizona. The Court held that application of the California statute, under the facts of this case, constituted an undue burden upon interstate commerce.

We are dealing here with the only television station located in the isolated desert town of Yuma, Arizona, about 60 miles from the nearest population center of El Centro-Brawley, California. The intervening area is bisected by great sand dunes and arid desert. As established by the stipulated statement of facts (Petition, Appendix B), the advertising optical firm is located in Arizona, where the advertising in question is entirely lawful. The optical firm has no office in California and does not engage in mail-order or other business in California. Its advertising messages are designed for and directed to the citizens of Arizona. All programming by the television station is carried from Respondent's studios in Yuma, Arizona to a transmitting tower on Black Mountain in Imperial County, California, and then broadcast back to viewers in Arizona. By reason of the location of the transmitter tower the programming is also seen within television range of Imperial County, California and the Republic of Mexico. Obviously, if the television station may not carry the advertising on its broadcast signal which reaches Imperial County, California, it cannot carry the advertising to its Arizona viewers. Thus, the effects of California's regulation of this advertising would in no sense be "localized." *Cf. Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U.S. 714, 721 (1963).

The California Court of Appeal observed that the question presented in the *Head* case involved a New

Mexico statute, a newspaper and a radio station located in New Mexico, and advertising purposely directed to the residents of New Mexico. The Texas optometrist whose advertising was involved in the *Head* case was located immediately adjacent to the border city of Hobbs, New Mexico; the clientele of the Texas optometrist, unlike that of the Arizona optical firm in the case at bar, consisted of persons on both sides of the state border. The advertising in question had a direct effect upon the residents of Hobbs, New Mexico. A major difference, therefore, between the *Head* case and the one presently before the Court is that only the former presented a real rather than an academic problem involving residents of the regulating state.

In *Head,* the court held only that "the New Mexico statute, *as applied here* to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce." 374 U.S. at 429; emphasis supplied. Mr. Justice Brennan, concurring, cautioned that the decision was limited in its meaning (374 U.S. at 447):

> "Our holding today intimates no view of the constitutionality of several other superficially similar forms of state regulation of broadcasting. First, nothing here said suggests that a system of state regulation, although not in direct conflict with federal law, would pass muster if it were so pervasive and so burdensome upon broadcasters as to interfere substantially with the overall purposes of federal regulation. *Cf. Allen B. Dumont Labs* v. *Carroll, supra.* Second, nothing said answers the problem of the situation, factually closer to that at bar but legally quite distinct, which would be presented if a State in which nationwide network material originates sought to restrict network ad-

> vertising under a statute enacted for the protection only of that State's consumers. Such regulation might well exceed the scope of the State's legitimate interests and involve a constitutionally illegitimate attempt to control communications beyond its borders. *Cf. Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520; *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 775. Third, nothing said here may be read to sustain the constitutionality of applications of local advertising regulations which threaten to make it impossible for a local station to transmit network broadcasts because of their sponsorship. While the State's interest might be no different from that protected by this New Mexico statute, the more drastic effect of the regulation upon the exercise of the broadcaster's federal license and his access to network material might well require a different result. All that the Court decides today is that this New Mexico statute may constitutionally be enforced against radio broadcasters equally with other news media doing business in New Mexico."

The California Court of Appeal commented thereon in its opinion (Petition, Appendix A, p. 11):

> "While not precisely within the categories specified in the concurring opinion, the injunction here works the very mischief which the opinion warned would result if an attempt were made to extend the rule of the case beyond the facts then before the court. It requires little imagination to foresee the confusion and conflict which would arise if one state were permitted to impose its individually adopted statutes to bar the transmission of television programs originating in another state. The variety of restrictions and requirements which could result emphasizes our conclusion the injunction issued results in an unconstitutional use of the statutes and imposes an undue burden on interstate commerce."

It is significant that it was a California court which so held and the Supreme Court of California which denied hearing in the case. Both may be presumed to be sensitive to the interests of that state in the enforcement of its statutes.

The obvious purpose of the price advertising law in the State of California is to prevent professional optometrists from competing with one another by cutting price to the detriment of the quality of professional service. The present case before the Court is not even remotely concerned with the profession of optometry in California. If we examine the reason for this statute, it makes no sense whatever to extend these sanctions to an Arizona broadcaster transmitting advertising for an Arizona optical company to Arizona viewers, especially when most of the station's viewers in California reside some 60 miles or more from the nearest office of the optical company at Yuma, Arizona.

Thus, it can be seen that what is presented here is not a conflict between the decision below and this Court's prior decision in *Head,* but merely the assertion by the California Attorney General of an alleged error of interpretation in the state court's refusal to extend the result in *Head* to a significantly different situation.

The California Court of Appeal correctly concluded that the superior court's injunction to proscribe acts in Arizona—acts completely legal in that state—cast an undue burden on interstate commerce. It is clear that the threatened harm to the State of California and its citizens, under the facts of this case, was so academic and insubstantial as to be outweighed by the burdensome, direct and substantial economic harm which

would be caused to the Arizona optical company and the Arizona television station if the lawful advertising in Arizona were effectively prohibited. See *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U.S. 714, 719 n. 5 (1963).

In sum, the decision of the Court of Appeal is wholly consistent with the *Head* decision; it does not lay down any new constitutional precept; it does not have direct application to any but the peculiar facts of this case; and it is correct.

CONCLUSION

In view of the foregoing, there are no special and important reasons for the Court to review the decision below, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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